

No. 76-481

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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DUKE CITY LUMBER CO., ET AL., PETITIONERS

v.

JOHN A. KNEBEL, SECRETARY OF AGRICULTURE, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 539 F. 2d 220. The opinion of the district court (Pet. App. B1-B23) is reported at 382 F. Supp. 362.

## JURISDICTION

The judgment of the court of appeals was entered on July 6, 1976. The petition for a writ of certiorari was filed on October 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the 1971 Federal Timber Sales Set-Aside Program adopted by the Small Business Administration and the Department of Agriculture, establishing a bidding

preference for small businesses in the sale of a portion of the timber in national forests, is reasonably related to the Small Business Act's provision "that a fair proportion of the total sales of Government property be made to small-business concerns."

2. Whether the Federal Timber Sales Set-Aside Program was adopted in violation of the Administrative Procedure Act.

#### STATUTE AND REGULATION INVOLVED

1. Section 2[2] of the Small Business Act, 72 Stat. 384, as amended, 15 U.S.C. 631, provides in pertinent part:

(a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be

made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

Section 2[15] of the Small Business Act, 72 Stat. 395, 15 U.S.C. 644, provides:

To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.

Section 2[5] of the Small Business Act, 72 Stat. 385-387, as amended, 15 U.S.C. 634, provides in pertinent part:

(b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—



\* \* \* \* \*

(6) makes such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter;

Section 2[10] of the Small Business Act, 72 Stat. 393-394, as amended, 15 U.S.C. 639, provides in pertinent part:

(f) \* \* \* When requested by the Administrator, each department and agency of the Federal Government shall consult and cooperate with the Administration in the formulation by such department or agency of policies affecting small-business concerns, in order to insure that small business interests will be recognized, protected, and preserved. \* \* \*

2. 13 C.F.R. 121.3-9 provides in pertinent part:

(b) Sales of Government-owned timber. (1) In connection with sale of Government-owned timber, a small business is a concern that:

(i) Is primarily engaged in the logging or forest products industry;

(ii) Is independently owned and operated;

(iii) Is not dominant in its field of operation; and

(iv) Together with its affiliates, its number of employees does not exceed 500 persons.

#### STATEMENT

1. The Small Business Act declares that it is national policy "in order to preserve free competitive enterprise, \* \* \* to insure that a fair proportion of the total sales of Government property be made to [small-business concerns] \* \* \*." Section 2[2](a), 15 U.S.C. 631(a). To effectuate this policy the Act requires that small business

concerns "be awarded any contract for the sale of Government property, as to which it is determined by the [Small Business] Administration and the \* \* \* disposal agency \* \* \* to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns \* \* \*." These determinations may be made \* \* \* for classes of awards or contracts." Section 2[15], 15 U.S.C. 644.

Pursuant to this statutory authority, in 1971, the Small Business Administration and the Department of Agriculture Forest Service agreed to replace a 1958 agreement setting aside national forest timber for sale to small business with a revised program (Pet. App. E19-E23). The agencies concluded that the new program would better serve to ensure that a "fair proportion" of the total sales of government-owned timber be made to small business concerns. "Small business concern" was defined in the 1971 program as any business concern primarily engaged in the forest products industry which is independently owned and operated, not dominant in its field of operation, and having no more than 500 employees. 13 C.F.R. 121.3-9(b).

In general, national forest timber is sold through open competitive bidding to all interested concerns. To provide both small and large business concerns with an equitable opportunity to compete, the agencies utilized historical purchases of national forest timber as the measure of "fair proportion." Under this approach, they determined that a "fair proportion" should be the average federal timber sales to small businesses in any timber marketing area in the preceding five-year "base" period, 1966 through 1970 ("base average share") (see

Pet. App. B5, E4-E5).<sup>1</sup> Whenever, in any six-month period, the sales to small business concerns of national forest timber in a particular marketing area fall ten percent below the base average share, a "set-aside" sale is held.<sup>2</sup> The amount of timber "set aside" for sale to small business equals the total volume of the cumulative deficiency plus the base average share for the period (Pet. App. E8-E9). In set-aside sales, the bids of small business concerns are opened first. Set-aside timber that small business concerns fail to purchase may be sold to large concerns but is counted toward the small business base average share (Pet. App. E6, E16). The base average share is recomputed every five years but may not be reduced to less than one-half of the 1966-1970 base period (Pet. App. B4-B7).

The original 1958 program had required the Forest Service to set aside timber for preferential bidding by small business only when a "need" was shown (Pet. App. B3). The Small Business Administration and the Department of Agriculture revised the program in 1971 because the 1958 program was not working and participation by small business in the forest products industry was declining. While small businesses had purchased 75 percent of national forest timber sold in 1958 in several forest regions of the nation, they purchased only 44 percent during the 1966-1970 period (Pet. App. B3-B4 n. 5). It became clear to the two agencies that the

<sup>1</sup>Details of the program were set forth in revisions to the Forest Service Manual (Pet. App. E1-E19).

<sup>2</sup>"Had small business purchased a volume of timber above this trigger point but below the base period percentage, there would be no set-aside sale in the following six months. Any surplus above the small business share is carried over from period to period to offset any deficit. Likewise, any deficiency less than 10 per cent is carried over from period to period until the accumulated deficit reaches 10 per cent at which point the set-aside program is triggered" (Pet. App. B5-B6).

1958 program was not effectively ensuring that a fair proportion of the sales of national forest timber be made available to small business concerns (Pet. App. B3-B4).

Accordingly, after extensive consultation with representatives of both small businesses and large businesses in the forest products industry (Pet. 5-6; Pet. App. B14-B16), the Small Business Administration and the Department of Agriculture in 1971 adopted the revised program described above, concluding that it would be "an important tool \* \* \* to ensure that an appropriate share of [national forest] timber sales are made to small business concerns" (Pet. App. E2).

During the first 2 1/2 years of the 1971 program's implementation, less than 6 percent of national forest timber sold was purchased at set-aside sales (Pet. App. B7).

2. Petitioners are eleven large businesses in the forest products industry (Pet. App. C1). In 1972 they instituted this suit in the United States District Court for the District of Columbia for declaratory and injunctive relief. They alleged that the revised set-aside program was invalid under the Small Business Act, had no rational basis, and was procedurally defective under the Administrative Procedure Act (Pet. App. B2 and n. 3). The district court, after determining that petitioners had standing (Pet. App. B7-B10), rejected these arguments in a comprehensive opinion (Pet. App. B1-B23).

The court held that the program had a rational basis and was within the authority of the Small Business Administrator (Pet. App. B10-B14) as a "reasonable, precise yet flexible, means of insuring that small businesses receive 'a fair proportion' of government timber sales" (Pet. App. B13), which "does not reduce large



business' historical share of the timber market nor does it increase that of small concerns" (Pet. App. B23).

In addition, the court held that the notice and hearing requirements of the Administrative Procedure Act were inapplicable because the program involves matters relating to government property or contracts specifically exempted from such requirements by 5 U.S.C. 553(b)(2). The court concluded that, in any event, petitioners had suffered no prejudice because they had actual notice of the proposals for revision of the 1958 set-aside program and actively participated in the development of the 1971 program (Pet. App. B15-B16).<sup>3</sup>

The court of appeals affirmed *per curiam* (except that it held petitioners' challenge to a minor aspect of the 1971 program, the bar against reducing the base average share below 50 percent of the 1966-1970 period, to be not ripe for adjudication) (Pet. App. A1-A3).

#### ARGUMENT

Petitioners contend that the 1971 Federal Timber Sales Set-Aside Program established by agreement between the Department of Agriculture and the Small Business Administration is in excess of authority conferred by the Small Business Act, lacks a rational basis, and was adopted in violation of the Administrative Procedure Act. These

<sup>3</sup>The court also rejected petitioners' contentions, not raised here, that the program required an environmental impact statement (Pet. App. B17-B20), and that it denied them substantive due process and violated Section 2 of the Employment Act of 1946, 60 Stat. 23, 15 U.S.C. 1021, and Section 4(a) of the Economic Stabilization Act Amendments of 1971, 85 Stat. 753, 15 U.S.C. (Supp. III) 1026(a) (since repealed), and statutes governing the national forests (Pet. App. B20-B22).

contentions were correctly rejected by the courts below and do not warrant further review.<sup>4</sup>

1. a. The district court correctly determined that the 1971 Federal Timber Sales Set-Aside Program furthers the express statutory objective, in Section 2[15] of the Small Business Act, 15 U.S.C. 644, of ensuring that a "fair proportion" of federal property sales be made to small businesses. As the district court observed: "The ratio of timber sales which the program seeks to preserve is based upon the competitive history within the industry. Small business is guaranteed no more than an opportunity to bid on that proportion of the market which it has purchased in the past" (Pet. App. B13). Congress determined that by reserving such opportunities for small business, its purpose of preserving free markets, free entry into business, and opportunities for personal initiative could be realized. See 15 U.S.C. 631. The set-aside program is thus " ' reasonably related to the purposes of the enabling legislation.' " *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369.

<sup>4</sup>There is, moreover, considerable doubt as to petitioners' standing here. Petitioners' claim of standing is based upon their status as future purchasers of national forest timber. As the district court recognized, however, they "have no vested proprietary right in the government's contracts or property" (Pet. App. B20). The Small Business Act, upon which they principally rely in this Court, does not contain any provisions within whose zone of protection petitioners' claims arguably fall. To the contrary its provisions for setting aside a fair proportion of government contracts for small business confer "no enforceable rights upon prospective bidders." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 126 (footnote omitted). In consequence, petitioners cannot claim standing as persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute \* \* \* ." 5 U.S.C. 702.

Petitioners' contention (Pet. 11-16) that the 1971 set-aside program serves "to regulate competition," rather than to insure small businesses a fair proportion of federal timber sales, is addressed to the wrong forum. Congress determined that "to preserve free competitive enterprise" (15 U.S.C. 631(a)), small business concerns "shall receive" a fair proportion of government contracts. 15 U.S.C. 644. The 1971 timber sales set-aside program served to advance that objective, as the district court found, without either reducing large business' historic share or increasing the share of smaller concerns (Pet. App. B23). To the extent that establishment of any system of preferential bidding for small business regulates competition for the purchase of timber, such regulation is both permitted and intended by Congress.<sup>5</sup>

b. Petitioners assert (Pet. 16-18) that the program lacks a rational basis because, they contend, there is no factual data showing a decline in small business's share of timber sales. The statistics do show a decline, however, as the district court found (Pet. App. B3-B4, n. 5, B12). But the program is consistent with the Act, whether or not there had been a decline in sales to small businesses. Congress itself determined that small concerns were to be granted a fair proportion of the government's business, and the 1971 program effectuates that legislative objective for the future irrespective of whether

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<sup>5</sup>Such a system of preferential bidding does not "freeze" the structure of the forest products industry in perpetuity. It simply implements the policy of the Small Business Act to prevent large firms from excluding small firms from the market place. Moreover, the plan's provision for recomputation of small business' base average share every five years assures that industry structure will remain responsive to long-term market conditions.

small business' share of federal timber sales had been declining in the past (see Pet. App. B12).<sup>6</sup>

2. Petitioners incorrectly contend (Pet. 18-21) that in adopting the 1971 set-aside program the Small Business Administration and the Forest Service failed to comply with the Administrative Procedure Act. The requirement of publication of proposed rulemaking in the Federal Register does not apply to matters relating to public property or contracts (5 U.S.C. 553(a)(2)), and does not apply where the persons subject to the rules "have actual notice thereof in accordance with law." 5 U.S.C. 553(b). Petitioners had actual notice of the proposed program and they participated in the proceedings leading to the adoption of the program and submitted their own data, views, and arguments (see Pet. App. B15, nn. 27, 28, 29). Thus, as the district court found (Pet. App. B15-B16), petitioners have suffered no prejudice or disadvantage, and the requirement of publication did not apply as to them.<sup>7</sup>

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<sup>6</sup>A showing of specific need was required under the 1958 set-aside program, and that was one of the deficiencies of that program (see Pet. App. B4 and n. 7).

<sup>7</sup>Since the requirement by its own terms did not apply, it is irrelevant whether, as petitioners claim (Pet. 20), the public property exemption had been waived by the affected agencies. Cf. *Rodway v. United States Department of Agriculture*, 514 F. 2d 809, 814 (C.A. D.C.).



**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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**DECEMBER 1976.**